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NO. 94-982

In The

Supreme Court of The United States

October Term 1994

JOHN O'NEILL and SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

Respondents.

BRIEF OF RESPONDENT CITY OF PHILADELPHIA, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Third Circuit err in reviewing the District Court's decision refusing to abstain under *Younger v. Harris,* 401 U.S. 37 (1971) for abuse of discretion, rather than *de novo?*

2. Did the District Court err in refusing to abstain under *Younger v. Harris,* 401 U.S. 37 (1971), where state administrative proceedings, implicating an important state interest, had been discontinued without state judicial or administrative review, and where Petitioners' federal claims could have been raised in the course of such review?

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COUNTERSTATEMENT OF THE CASE

Respondent[1] adopts as its Counterstatement of Facts the summary of events and overview of relevant administrative procedures of the Bureau of Administrative Adjudication ("BAA") set forth in the majority opinion of the

1 The Office of the Director of Finance and the Bureau of Administrative Adjudication are not separate legal entities, but simply agencies of the City of Philadelphia, which the District Court found was the only proper defendant. (*See* Opinion of District Court, A. 51a, n.1)

Court of Appeals. (A. 6a -12a) We wish to clarify certain points directly relevant to the issue presented in the present Petition for Certiorari.

A.

Within the BAA adjudicatory scheme, an initial decision of a hearing examiner may be appealed to the Parking Appeals Panel. (A. 7a) The Parking Appeals Panel has the power to affirm, reverse or modify any determination appealed from, and may also hear the case *de novo.* Phila. Code §12-2808(2). By the terms of the ordinance, the Appeals Panel "shall have the power to review the facts and the law, and shall have power to affirm the determination or to reverse or modify any determination appealed from for error of fact or law. . ." Phila. Code §12-2808(2)(emphasis added). Thus, under this section, constitutional challenges to BAA proceedings can be raised in the context of an administrative appeal. No Pennsylvania cases exist which prohibit an administrative agency from considering such questions.

The order of the Parking Appeals Panel constitutes the final order of the Director of Finance; if no appeal is taken, the order of the hearing examiner is the final order.[2]

Judicial review of the BAA's final order is available by way of an appeal to the Court of Common Pleas of Philadelphia County pursuant to Pennsylvania's Local Agency

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2 Phila. Code § 12-2808(5) states:

"The order of a Parking Appeals Panel shall be the final order of the Finance Director's Office. However, in the event that no appeal is taken, the order of the Parking Hearing Examiner shall be the final order. If payment is not made within thirty (30) days after entry of a final order determining liability for a parking violation and fixing fines, costs and additional fees for such violation, such fines, costs and additional fees shall be considered a debt due and owing the City."

Law, 2 PA.C.S.A. §§ 751-754, and the Judicial Code, 42 PA.C.S.A. § 933(a)(2).[3] On appeal to the Court of Common Pleas, a defendant clearly has the opportunity to raise the constitutionality of the proceedings before the BAA.[4]

Pursuant to the terms of BAA ordinance, any appeal to the Parking Appeals Panel from a hearing examiner's determination must be taken within 30 days of entry of such final determination. Phila. Code §12-2808(3). By local court rule, a party appealing to the Court of Common Pleas has 30 days from the date of the adjudication by the

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[3] Specifically, 2 PA.C.S.A. § 752 states:

"Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)."

[4] 2 PA.C.S.A. § 754 provides, in relevant part:

(a) In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand . . . for the purpose of making a full and complete record. . .

(b) In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law . . .

agency within which to file an appeal.[5]

A final BAA order assessing fines is not a judgment against the violator, but merely a debt owed to the City. Phila. Code §12-2808(5). (A. 7a) This is true regardless of whether the final order results from a default because of failure to request a hearing, or from a determination of liability after a hearing or after an administrative appeal. In order to collect the debt, the City must proceed to a court of appropriate jurisdiction to obtain an enforceable judgment.

Enactment of the Ordinance created a period of dual jurisdiction. Phila. Code § 12-2807(8). (A. 8a) A person who had received a parking ticket, citation or summons from the Traffic Court between October 2, 1987 and June 1, 1989, could choose to proceed either in Traffic Court or the BAA.[6]

In Traffic Court, a defendant was entitled to three rights not provided in a BAA hearing: a disposition could not be made without the personal appearance of the defendant; the defendant's guilt had to proved beyond a reasonable doubt; and, because parking violations are summary offenses, they

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5 Phila. Civ. R. 320(D), states:

"(D) *Time for Appeal.* An appeal shall be filed not later than thirty days after the date of the adjudication by the agency unless otherwise provided by statute or ordinance. The date of the adjudication shall be the date of mailing of the notice of adjudication by the agency, which date shall be separately and clearly designated on such notice." [Footnote omitted]

6 June 1, 1989 is the effective date of the ordinance which established the BAA. The reason for the October 2, 1987 date is that individuals with tickets issued prior to that date were automatically eliminated from the computer system because they presumptively qualified for the two year statute of limitations defense applicable in Traffic Court. (A. 54a, n.2)

were subject to the two year statute of limitations contained in 42 Pa.C.S.A. § 5553(e).

B.

Petitioners Goodman and O'Neill each received parking tickets before the effective date of the Ordinance. (District Court's Opinion, A. 54a) Neither Petitioner paid the fines, and the Traffic Court lodged an information and issued a summons. (A. 55a) A summons was served on each, stating the fines and penalties for the offense, with a notice to appear in Traffic Court on a date certain. Neither Goodman nor O'Neill appeared for the scheduled hearing, and the Traffic Court periodically sent notices to them seeking payment. (A. 55a)

In November of 1989, Goodman and O'Neill each received a "Violation Warning Notice" from the Office of the Director of Finance. This notice informed them that they could elect to appear before the Traffic Court or proceed in the BAA, and informed them that the former proceeding would be treated as a criminal matter whereas the BAA proceeding would be a civil action. Goodman and O'Neill took no action in response to this notice.

On March 4, 1991, Goodman requested a hearing before the BAA to adjudicate a ticket he received on February 4, 1991. At the hearing, the BAA listed for disposition four additional tickets for violations that had occurred before June 1, 1989. Counsel for Goodman appeared at the hearing and objected to including these pre-June 1, 1989 tickets in the proceedings, on the basis that they were within the Traffic Court's exclusive jurisdiction and that Goodman had not consented to the BAA's jurisdiction. Moreover, Goodman's counsel raised the statute of limitations defense as to all tickets that were more than two years old.

On the date of Goodman's hearing (March 18, 1991), a "Code 41" disposition was available in BAA proceedings which, when requested, would have required the hearing

examiner to refrain from making any disposition of parking tickets which Goodman refused to submit to the Director of Finance's jurisdiction. The provision for a Code 41 disposition is consistent with § 12-2807(8) of the Ordinance, which states that a party may elect to have violations originally subject to Traffic Court jurisdiction heard by the BAA.

The hearing examiner overruled Goodman's objections, apparently holding that the BAA had jurisdiction regardless of consent, and that the statute of limitations only applied in Traffic Court where parking violations were treated as criminal offenses. The Hearing Examiner determined liability, and assessed a total fine of $247.00, which included $173.00 for tickets issued before June 1, 1989. Goodman has paid his fines.

When Petitioner O'Neill tried to have three pre-June 1, 1989 parking tickets listed for disposition in Traffic Court in April of 1991, the court informed him that it no longer heard parking violation cases. Subsequently, O'Neill requested a hearing, which the BAA scheduled for August 30, 1991. O'Neill attended the hearing with counsel, raised the same objections as Goodman, and experienced the same lack of success. The Hearing Examiner determined liability, and reduced the assessment of fines to $45.00. To date, O'Neill has not paid any of his fines. The same Code 41 disposition which was available in Goodman's case was also available to O'Neill.

Neither Goodman nor O'Neill ever appealed to the Parking Appeals Panel or to the Court of Common Pleas.

As noted above, a default or a finding of liability by a BAA hearing examiner or the Parking Appeals Panel does not result in a judgment against the offender, but is only considered a debt due the City. Phila. Code §12-2808(5). (A. 7a) It is undisputed that no judgments were ever entered against either Petitioner, and that their vehicles were never towed or immobilized as a result of any of the violations or proceedings at issue in this case.

Respondent disagrees with Petitioners' statement to the effect that the Director of Finance transferred all traffic tickets issued out of Traffic Court prior to June 1, 1989 into the jurisdiction of the BAA, and that such tickets were "transposed into a mature debt . . . to the City of Philadelphia." (Petition for Certiorari, p. 4). On the contrary, these Petitioners were afforded an opportunity for hearing on their pre-June 1, 1989 tickets before the BAA. At that hearing, they had the opportunity to raise the statute of limitations defense, as well as the opportunity to object to BAA jurisdiction by invoking the Code 41 procedure. In the event the BAA Hearing Examiner or Parking Appeals Panel rejected these defenses, Petitioners had full opportunity for judicial review. Finally, any further collection effort could not have proceeded on the basis of a final order of the BAA, but would have required a judgment against Petitioners from a state court.

C.

Petitioners commenced this action on October 30, 1991 in the United States District Court for the Eastern District of Pennsylvania under 42 USC § 1983, seeking declaratory and injunctive relief, and monetary damages, for alleged deprivation of their constitutional rights. On January 6, 1992, one of the defendants, the Philadelphia Parking Authority, was dismissed from the case with prejudice pursuant to a motion under Fed. R. Civ. P. 12(b)(6). Thereafter, Petitioners were granted leave to amend their Complaint. The case proceeded on the basis of their Second Amended Complaint.

In their prayer for relief before the District Court, Petitioners asked that the BAA ordinance be declared void to the extent that it conferred jurisdiction upon the BAA; that all BAA hearings on parking violations occurring prior to March 22, 1989 and all liability imposed thereon, be declared void; that defendants be enjoined from conducting hearings or collecting fines for parking violations which occurred prior to March 22, 1989; and that the City be ordered to refund all fines, costs and fees collected as a result of the allegedly void

proceedings. Thus the relief sought by Goodman and O'Neill in federal court constituted a direct attack on the results of the BAA's adjudications against these Petitioners.

On the date the federal suit was commenced, the time for Petitioner Goodman to file an appeal to the Parking Appeals Panel or the Court of Common Pleas had expired. Goodman, of course, had chosen to pay the amount assessed against him. O'Neill, on the other hand, may have been within the time for appealing to state court on the date the federal action was commenced.[7] In any event, no such appeal was ever filed.

Abstention was properly raised in the City's Answer to Plaintiffs' Second Amended Complaint and in the City's Motion for Summary Judgment. The subsequent proceedings in the District Court and the Court of Appeals are clear from the Opinions of those courts.

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[7] A defendant has thirty days from entry of a hearing examiner's determination to appeal to the Parking Appeals Panel. Phila. Code §12-2808(3). Failure to appeal renders the order final. Thereafter, the defendant has thirty days from the date of mailing of a notice of adjudication to appeal to the Court of Common Pleas. *Supra,* at n. 5.

It is unclear from the record when the hearing examiner's determination was entered in O'Neill's case, and it may have been after the August 30, 1991 hearing. It is also possible that the mailing date of the notice of adjudication may have extended the period for appealing to state court for a few days. Both of these factors may have combined to extend the date for filing a state court appeal until shortly after the date the federal suit was filed (October 30, 1991).

SUMMARY OF ARGUMENT

In reaching its decsion that the District Court should have abstained under *Younger v. Harris,* the U.S. Court of Appeals for the Third Circuit utilized an abuse of discretion standard of review. This standard conflicts with the *de novo* standard of review for *Younger* abstention used by the Sixth, Seventh and Ninth Circuits.

Nevertheless, the Court of Appeals' reversal of the District Court pursuant to *Younger* was correct under the applicable decisions of this Court, particularly under *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

However, the precise question of whether a state proceeding is pending for *Younger* purposes where state administrative proceedings had taken place, but were discontinued without state administrative or judicial review which would have afforded plaintiffs the chance to raise their constitutional claims, has not been decided by this Court, and has produced conflicting answers among the circuits.

ARGUMENT

I. THE STANDARD BY WHICH THE COURT OF APPEALS REVIEWED THE DISTRICT COURT'S REFUSAL TO ABSTAIN WAS INCORRECT, AND IN CONFLICT WITH THE STANDARD OF REVIEW APPLIED IN OTHER CIRCUITS.

Respondent believes that it is appropriate to call attention to an issue which is fairly encompassed within the Petitioners' Question Presented for Review, but which was not expressly stated by Petitioners. This question is whether a district court's decision to abstain under *Younger* should be reviewed by a court of appeals under a *de novo* standard of review, or for abuse of discretion. This question is closely connected with the question presented by Petitioners. Furthermore, it is a question that it has not previously been decided by this Court, and which has generated conflicting answers by different courts of appeals.

In reviewing the District Court's judgment, the Court of Appeals for the Third Circuit applied a two-part standard of review:

> "We exercise plenary review over the legal determinations of whether the requirements for abstention have been met. [Citations omitted.] Once we determine that the requirements have been met, we review a district court's decision to abstain under *Younger* abstention principles for abuse of discretion." *Gwynedd Properties, Inc. v Lower Gwynedd Township,* 970 F.2d 1195, 1199 (3d Cir. 1992).

(A. 13a)

This standard of review is directly contrary to that used by the Ninth Circuit, which reviews a district court's refusal to abstain under a *de novo* standard. *Fresh International Corp. v. Agricultural Labor Relations Bd.,* 805 F.2d 1353, 1356 and n. 2 (9th Cir. 1986); *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 1987); *Beltran v.*

State of California, 871 F.2d 777, 781 (9th Cir. 1988). The Third Circuit's standard of review is also at odds with the decisions of the Sixth and Seventh Circuits, which review a district court's decision to abstain *de novo. Traughber v. Beauchane,* 760 F.2d 673 (6th Cir. 1985); *Trust & Investment Advisers, Inc. v. Hogsett,* ___ F.3d ___, 1994 WL 706102 (7th Cir. December 19, 1994)(reviewing the cases and noting the conflict among the circuits).

We submit that the Ninth Circuit rule is correct. This Court has stated that where the prerequisites for abstention under *Younger* are satisfied, a district court is required to abstain absent evidence of bad faith, harassment, patent invalidity of a state statute or other extraordinary circumstances. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 816 n. 22 (1976); *Middlesex County Ethics Committee v. Garden State Bar Assoc.,* 457 U.S. 423, 432 (1982). Accordingly, in *Fresh International Corp.,* the court held that while an abuse of discretion standard may be appropriate for other forms of abstention, it is not suitable for review of *Younger* claims because a district court has no discretion to issue an injunction in such cases. *Fresh International Corp.,* 805 F.2d at 1356 n. 2.

As noted in *Fresh International Corp.*, cases using the abuse of discretion standard generally involve abstention claims brought under a variety of different theories besides *Younger. Fresh International Corp.,* 805 F.2d at 1356 n. 2. Such cases seem to be the origin of the Third Circuit rule. *See Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1115 (3d Cir. 1986)(reviewing claims of *Burford* and *Younger* abstention under an abuse of discretion standard of review); *United Services Automobile Ass'n v. Muir,* 792 F.2d 356 (3d Cir. 1986)(reviewing *Burford, Pullman* and *Younger* claims under a single abuse of discretion standard).

Arguably *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984) supports an abuse of discretion standard of review. ("We begin with the question whether the District Court abused its discretion in not abstaining from the exercise

of its jurisdiction." *Id.* at 236) But *Midkiff* involved both *Younger* and *Pullman* abstention, and disposed of the *Younger* claim not under an abuse of discretion standard, but by deciding that an essential predicate for abstention, the pendency of state judicial proceedings, was not present. *Id.* at 237-38. This amounted to a determination that the lower court erred as a matter of law, not that it abused its discretion.

II. THE COURT OF APPEALS' DECISION THAT ABSTENTION WAS PROPER UNDER THE FACTS OF THIS CASE IS CONSISTENT WITH THE DECISIONS OF THIS COURT. HOWEVER, THERE EXISTS A CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

The precise question on which certiorari is sought is whether the District Court erred in refusing to abstain where state administrative proceedings, implicating an important state interest, were discontinued without state judicial or administrative review, and where Petitioners' constitutional claims could have been raised in the course of such administrative or judicial review. This question has been recognized, but not squarely addressed, by this Court. *New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350, 369 n. 4 (1989)

The Court of Appeals found while the BAA proceedings had terminated without the involvement of any state court, that fact did not reduce the state's interest in the proceedings to the extent that abstention under *Younger* was improper. Despite the forceful dissent of the Honorable Timothy K. Lewis, we submit that the decision of the Court of Appeals was consistent with the principles stated by this Court concerning federal abstention from interference with state proceedings.

Although *Younger* involved an injunction against a pending state criminal proceeding, it has been extended to federal actions seeking declaratory relief. *See Samuels v. Mackell*, 401 U.S. 66 (1971). Furthermore, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) has extended *Younger* to

require abstention where the state proceedings, although civil in nature, are closely akin to criminal proceedings. This has been held to include nuisance actions (*Huffman*), professional disciplinary actions (*Middlesex County Ethics Committee*, 457 U.S. 423 (1982)), and contempt proceedings (*Juidice v. Vail*, 430 U.S. 327 (1977)).

This Court has stated that *Younger* abstention is fully applicable even where state judicial proceedings have terminated prior to commencement of the federal action, if the federal plaintiff failed to exhaust available state court appellate remedies. *Huffman*, 420 U.S. 607-611 and n.22.

That the principles of *Younger* apply to state administrative proceedings was established in *Middlesex County Ethics Committee* and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). Indeed, *Dayton* established that it is sufficient for abstention purposes that a plaintiff's constitutional claims can be raised in state judicial review of an administrative proceeding, even if they might not properly be raised in the administrative proceeding itself. *Dayton*, 477 U.S. at 629.

In essence, the only distinguishing feature of this case, and the central point argued in Judge Lewis' dissent, is that the state proceedings in this case were at an end. This is true, but it cannot be the basis for holding that *Younger* does not apply. The termination of state proceedings is the result of Petitioners' own failure to avail themselves of the opportunities for state administrative and judicial review. Such opportunities existed under the BAA ordinance (Phila. Code §12-2808(2)), and under 2 PA.C.S.A. §§ 751-754. It is clear that in light of Petitioners' own refusal to appeal, it must be presumed that the state appellate process afforded them full and fair opportunity to present their federal constitutional claims. *Pennzoil. Co. v. Texaco*, 481 U.S. 1, 15 (1987).

The Court of Appeals clearly believed that the state's interest in regulation of on-street parking and the adjudication of violations was important. (A. 19a) Indeed, the Court noted that violations were previously treated as criminal offenses.

(A. 19a, n.15) If the state's interest in the subject matter of the BAA proceedings is important enough to warrant abstention while those proceedings are actually pending, which would be the result under *Dayton,* that result should not change because the proceedings are terminated, especially when they were ended by the voluntary choice of the Petitioners to commence action in federal court.

We believe that the Court of Appeals decision is correct and follows directly from this Court's decisions, but it is impossible to deny that there is a serious conflict among the circuits on the question presented for review. *Compare Allegheny Corp. v. Pomeroy,* 898 F.2d 1314 (8th Cir. 1990), *Allegheny Corp. v. McCartney,* 896 F.2d 1138 (8th Cir. 1990), and *Nevada Entertainment Industries v. City of Henderson,* 8 F.3d 1348 (9th Cir. 1993)(per curiam), all of which are consistent with the Third Circuit's decision in this case, *with Thomas v. Texas State Board of Medical Examiners,* 807 F.2d 453 (5th Cir. 1987) and *Norfolk & Western Railway Co. v. Public Utilities Comm'n of Ohio,* 926 F.2d 567 (6th Cir. 1991), holding that abstention was improper once state administrative proceedings were at an end. We therefore concede that this case appears to satisfy one of the considerations which are relevant to the exercise of the Court's discretion to grant certiorari. Supreme Court Rule 10.1(a).

CONCLUSION

Respondent believes that the Court of Appeals for the Third Circuit has decided the abstention question correctly under the applicable decisions of this Court. *See* Supreme Court Rule 10.1(c). Respondent concedes that the Court of Appeals' decision is in conflict with the decisions of other circuits on the same question, and that this question has not been directly determined by this Court. *See* Supreme Court Rule 10.1(a) & (c). Finally, Respondent takes no position on whether the Court of Appeals "has decided an important question of federal law which . . . should be decided by this Court." *See* Supreme Court Rule 10.1(c).

Respectfully submitted,

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